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IN THE

Supreme Court of the United States

ALBERTO R. GONZALES, Attorney General,

Petitioner,

—v.—

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, AND NATIONAL ABORTION FEDERATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-profit, non-partisan organization with over 500,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. The ACLU has a long history of vigorously defending the right to privacy – including the right to reproductive freedom – through litigation and advocacy, and has frequently appeared before this Court as both direct counsel and *amicus curiae*. The New York Civil Liberties Union ("NYCLU") is the New York state affiliate of the ACLU.

The National Abortion Federation ("NAF"), a non-profit organization founded in 1977, is the medical professional association of abortion providers in North America. Its members include over 400 non-profit and private clinics, women's health centers, hospitals, and private physicians' offices in 47 states. NAF's members care for over half the women who obtain abortions each year in the United States, and they perform and teach abortion procedures that are banned by the Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (the "Act"). Represented by the ACLU and its co-counsel, including the NYCLU, NAF is the lead plaintiff in *NAF v. Gonzales*, 437 F.3d 278 (2d Cir. 2006), in which the Second Circuit held the Act unconstitutional; ordered supplemental briefing on the question of remedy; but later

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made any monetary contribution toward the preparation or submission of this brief. Pursuant to Rule 37.3, letters indicating the parties' consent to the filing of this *amicus* brief have been submitted to the Clerk of this Court.

stayed that briefing after this Court granted review in one of the other challenges to the Act.

STATEMENT OF THE CASE

Fewer than four years after the Supreme Court struck Nebraska's ban on "partial-birth abortion," *Stenberg v. Carhart*, 530 U.S. 914 (2000), Congress passed the challenged Act. In three separate cases, physicians and medical providers – suing on behalf of themselves and their patients – claimed that the Act suffers from the same constitutional flaws as the Nebraska ban that this Court had struck down: the failure to include an exception to protect women's health, and broad language that sweeps within it the most common second-trimester, pre-viability abortion procedures. All three trial courts and three appellate courts to review the Act agreed that it violates the norms articulated in *Stenberg*. *See Planned Parenthood Fed'n of Am., Inc. v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006), *cert. granted*, 126 S. Ct. 2901 (2006); *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005), *cert. granted*, 126 S. Ct. 1314 (2006); *NAF v. Gonzales*, 437 F.3d 278. The *NAF* case is stayed pending this Court's review of the other two cases.

SUMMARY OF ARGUMENT

Under review are two of the three decisions in which United States Courts of Appeals have held that the federal "partial-birth abortion" ban flies in the face of this Court's recent ruling in *Stenberg*. Indeed, the Act fails in every respect to meet the requirements this Court set forth in that case. Rather than enact legislation conforming to this Court's clear commands, Congress simply declared that its own "findings" trumped this Court's conclusions. That

declaration is factually inaccurate and legally insufficient. Unsurprisingly, every court to review the Act has held it unconstitutional under *Stenberg* and the longstanding precedent that *Stenberg* applied. The Briefs of Respondents and of other *amici* in the two cases under review explain fully why this Court should affirm. *Amici* submit this brief to address specifically the Government's argument that Respondents cannot show that the Act violates their rights and their patients' rights unless they prove that it is unconstitutional in all – or in at least a large fraction of – its applications.

That argument is contrary to this Court's precedent, under which a plaintiff may prove that a law violates her constitutional rights, without regard to the number or proportion of the law's applications that are unconstitutional. Such "numbers" tests play a role not in determining whether constitutional rights are infringed, but in determining – where rights are infringed – how to remedy the violation. The government's argument that Respondents must meet some numerosity test in order to prove that the Act violates their and their patients' rights must be rejected.

In addition to illustrating that principle -- that a plaintiff need not meet any numerosity threshold in order to prove a violation of rights – the Court's decision in *Ayotte v. Planned Parenthood*, 126 S. Ct. 961 (2006), reveals the basic template for constitutional adjudication: first, even if implicitly, determine that the plaintiff has standing; second, evaluate whether there is a constitutional violation; and third – and only if a constitutional violation has been found – determine the proper remedy, such as facial invalidation or more limited relief. *See also, e.g., United States v. Booker*, 543 U.S. 220 (2005) (separating determination of constitutional violation

and determination of remedy); *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 477-80 (1995) (after holding restrictions on government employees' receipt of honoraria unconstitutional under First Amendment, the Court considered the appropriate remedy); *Califano v. Westcott*, 443 U.S. 76, 89-91 (1979) (after holding that government benefit program violated equal protection, the Court assessed whether constitutional violation should be remedied through nullification or extension of the benefits); Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945, 1956 (1997) (after court holds challenged law unconstitutional, it fashions the appropriate remedy).

The Court does not in every case explicitly delineate each of these steps, or consider them in the order listed above. But as an analytical matter, each inquiry is separate, and the answer to each is determined by distinct criteria.[2] The government's brief, however, routinely injects numbers tests into the analysis of whether a constitutional violation has occurred, even though those tests relate not to that issue, but

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[2] In the context of First Amendment overbreadth cases, where the challenger does not contend that the statute is unconstitutional as applied to her, the only remedy the Court considers is total invalidation. In that situation, it makes sense that the Court addresses the constitutional violation and the remedy in the same breath: to obtain facial invalidation – that is, to obtain the only relief available – the challenger must show that the law punishes a substantial amount of protected free speech. *See, e.g., Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003). But analytically, there are still two separate inquiries. The question of whether the law "punishes ... protected free speech" relates to the constitutional violation. *See, e.g., id.* at 118, 122-23 (determining that the challenged policy would not affect any First Amendment activity). The "substantial amount" (the "numbers" test) relates to whether facial invalidation is appropriate, *i.e.*, relates to remedy. *See, e.g., id.* at 120 (considering "whether the claimed overbreadth . . . is sufficiently 'substantial' to produce facial invalidity").

relate rather to the issue of remedy. Specifically, the government insists that Respondents must meet the "no set of circumstances" test enunciated in *United States v. Salerno*, 481 U.S. 739 (1987), or at least the "large fraction" test developed in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), in order to prove that the Act violates their rights. Pet. Br. at 9, 16 (*PPFA*); Pet Br. at 18-19 (*Carhart*). But in both *Ayotte* and *Casey*, the Court found a constitutional violation, regardless of the fact that the number of women for whom the challenged law was unconstitutional was very small. Indeed, the plaintiffs in those cases did not need to meet any "numbers" test to prove that the provisions in question were constitutionally infirm. Accordingly, as explained in Point I, *infra*, Respondents here need not meet any "numbers" test in order to prove that the Act violates their rights and the rights of their patients.

The government's other assertions are equally meritless. As explained in Point II, *infra*, and as this Court demonstrated in *Ayotte*, the *Salerno* and "large fraction" tests are not the exclusive tests for facial invalidation, and are not thresholds a plaintiff ever needs to meet in order to obtain partial invalidation. Finally, as discussed in Point III, *infra*, the government's assertion that the Ninth Circuit's decision below altered the standard for facial challenges to abortion restrictions is incorrect and inapposite.

ARGUMENT

I. Neither *Casey*'s "Large Fraction" Test Nor *Salerno*'s "No Set of Circumstances" Test Determines Whether the Act Is Unconstitutional.

A court's analysis of whether a statute is constitutionally

infirm is independent of how many – or how few – applications of a challenged law are unconstitutional. Yet the government erroneously suggests that to prove the Act is constitutionally infirm, Respondents must demonstrate, under *Salerno*, "that the statute is invalid in *all* its applications" or that, under *Casey*, the Act would impose medical risks on "at least a 'large fraction' of women covered by the statute." Pet. Br. at 18-19 & n.3 (*Carhart*); *see also* Pet. Br. at 9 (*PPFA*). In other words, the government claims that proving a constitutional violation depends on *how many* applications of a challenged law are invalid. *See* Pet. Br. at 9 (*PPFA*) ("[T]he relevant inquiry" when evaluating the constitutionality of an abortion restriction that lacks a health exception is whether "it places a substantial obstacle in the path of a woman seeking an abortion, in a large fraction of its applications"); *see also* Pet. Br. at 16-17 (*PPFA*); Pet. Br. at 19-20 (*Carhart*). As this Court's precedents demonstrate, the "no set of circumstances" test and *Casey*'s "large fraction" test simply do not bear on the analysis of whether a statute infringes constitutional rights. In general, quantifying unconstitutional applications comes into play only if and when a court has found a constitutional violation, and then proceeds to fashion a remedy.

The Court's recent decision in *Ayotte* demonstrates this principle. The plaintiffs in *Ayotte* claimed that a requirement that physicians notify a minor's parents before performing an abortion was unconstitutional because it failed to include an exception for medical emergencies. The Court held that the law unconstitutionally jeopardized minors' health, even though "pregnant minors, like adult women, need immediate abortions to" protect their health in only "some *very small percentage of cases*." 126 S. Ct. at 967 (emphasis added). The Court thus found a constitutional violation, even though

"[o]nly a few applications of . . . [the] statute would present [such] a . . . problem." *Id.* at 967, 969.

This Court's approach in *Salerno* is consistent with *Ayotte*. While there is debate over the precise meaning, application, and principles embodied in *Salerno*'s "no set of circumstances" test, this Court has never held that it plays a role in determining whether a statute violates constitutional rights. For example, members of this Court and scholars have understood the *Salerno* test as a bar to overbreadth standing. *See, e.g., Sabri v. United States*, 541 U.S. 600, 609 (2004); *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (Opinion of Stevens, J., Souter, J., and Ginsburg, J.); *see also* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 261 (1994) (*Salerno* itself recognized that First Amendment overbreadth doctrine, which relaxes normal standing rules, is an exception to the *Salerno* test). The "no set of circumstances" test is also thought to function as one measure of when total ("facial") invalidation is the appropriate remedy.[3] *See, e.g., Salerno*, 481 U.S. at 745 ("fact that [law] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it *wholly* invalid") (emphasis added); *see also Morales*, 527 U.S. at 80 n.3 (Scalia, J., dissenting) (*Salerno* rule relates to appropriateness

[3] *Salerno* has, on occasion, been invoked in other contexts as well – though never in the context of determining whether a constitutional violation has occurred. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 183 (1991) (citing *Salerno* in discussion of constitutional avoidance); *Reno v. Flores*, 507 U.S. 292, 300-01 (1993) (citing *Salerno* in recognizing that plaintiffs' challenge was based only on text of regulation, not the history of its enforcement, since it had been in effect for only one week before district court enjoined it).

of facial invalidation as a remedy, not to standing: a "statute is not *totally* invalid unless it is invalid in all of its applications") (emphasis added); *see also* Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 Mich. L. Rev. 1, 154-56 (1998) (characterizing *Salerno*'s "no set of circumstances" test as a mechanism for facial invalidity). The one inquiry that is not affected by the "no set of circumstances" test is whether the challenged statute violates a party's constitutional rights. Indeed, this Court has never held that a party must meet the "no set of circumstances" test – or any other numerosity threshold – for that purpose.

Casey offers yet another example of how this Court has traditionally and consistently determined whether an abortion statute violates the Constitution without regard to how many applications are unconstitutional, including the "large fraction" test enunciated in *Casey* itself.[4] Specifically, the *Casey* Court held that a spousal notice requirement for abortion violated the relevant constitutional standard – the "undue burden" test – despite the fact that the requirement affected only one percent of women obtaining abortions. 505 U.S. at 893-94 (holding that spousal notice provision would "impose a substantial obstacle" to abortion for women in abusive marriages). The numbers were thus irrelevant to whether the requirement violated the Constitution. The "large fraction" test came into play only when the Court turned to the question of remedy, and determined that total invalidation was appropriate because of the provision's broad

[4] Even the government at times recognizes that the "large fraction" test is a test for facial invalidation – i.e., remedy – in abortion cases. *See, e.g.*, Pet. Br. at 18 (*PPFA*); Pet. Br. at 14 (*Carhart*).

impact on battered spouses.[5] *Id.* at 895 (emphasis added); *see also infra* Point II.

In addition, the *Casey* Court demonstrated the independence of constitutionality from remedy (and from "numbers" tests) when it considered the medical emergency exception to the omnibus abortion restriction challenged in that case. The plaintiffs claimed that the law's medical emergency exception was so narrowly drawn that it "foreclose[d] the possibility of an immediate abortion" in certain medical emergencies. 505 U.S. at 880. The Court rejected that interpretation, holding that the exception would apply in all medical emergencies. In adopting this saving construction, however, the Court recognized that the medical emergency exception would otherwise be unconstitutionally narrow, and the Court "would be required to invalidate the restrictive operation of the provision." *Id.* Implicit in that conclusion is that an exception that did not encompass all medical emergencies would violate the Constitution – regardless of the fact that such emergencies occur infrequently.

In this case as well, the analysis of whether the Act violates the Constitution is unaffected by either *Salerno*'s "no set of circumstances" test or *Casey*'s "large fraction" test. Indeed, this principle is illustrated by the two-tiered

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[5] The government incorrectly claims that the "large fraction" test is limited to evaluation of spousal notice requirements for abortion. Pet. Br. at 16 (*PPFA*). The reason that the *Casey* Court applied the "large fraction" remedy test only in relation to the spousal notice requirement was that it upheld the constitutionality of the other challenged provisions, and thus never reached the question of remedy as to those provisions.

approach employed by the Ninth Circuit in its decision below, and by the Second Circuit in *NAF v. Gonzales*, 437 F.3d 278 (holding Act unconstitutional for lack of health exception and deferring ruling on remedy until after additional briefing). This Court should likewise reject the government's attempt to inject a numerosity threshold into the evaluation of whether the Act is constitutionally defective.

II. After a Court Finds a Constitutional Violation, It Must Fashion an Appropriate Remedy.

Upon finding a constitutional violation, a court must determine how to remedy the constitutional defects. The *Ayotte* Court outlined grounds on which a plaintiff can obtain facial invalidation, even where a law is unconstitutional in only a small percentage of its applications. Facial invalidation is the proper course (1) where crafting a narrowing remedy would require making distinctions in a "murky constitutional context," which may invade the legislative domain; (2) where "line-drawing is inherently complex," which may likewise invade the legislative domain; or (3) where severing unconstitutional applications is contrary to legislative intent.[6] *Ayotte*, 126 S. Ct. at 968.

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[6] The government incorrectly suggests that these factors should be relaxed in this case because, "to the extent that federalism concerns inform those limits on judicial competence, such concerns are inapplicable in the context of a federal statute." Pet. Br. at 41 n.10 (*PPFA*). As the *Ayotte* Court demonstrated by its reliance on numerous cases reviewing federal statutes, these "limits on judicial competence," *id.*, also apply when federal legislation is at issue to prevent encroachment on the legislative branch. 126 S. Ct. at 968 (citing, *inter alia*, *Booker*, 543 U.S. at 227 (reviewing federal statute); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999)

Indeed, where a limited injunction is contrary to legislative intent, the law must be struck down on its face – regardless of whether it is constitutional in most of its applications. *Id.* at 968-69. The *Ayotte* Court also counseled against substitution of the "judicial for the legislative department of the government":

> [W]e are wary of legislatures who would rely on our intervention, for it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside to announce to whom the statute may be applied.

Id. (internal quotation marks omitted). Contrary to the government's suggestion, therefore, *Ayotte* makes clear that *Salerno*'s "no set of circumstances" test and *Casey*'s "large fraction" test are not the exclusive tests for facial invalidation.[7] Pet. Br. at 13, 18 (*PPFA*); Pet. Br. at 18-19 (*Carhart*).

(reviewing federal executive order); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (reviewing federal statute); *The Employers' Liability Cases (Howard v. Illinois Central R.R. Co.)*, 207 U.S. 463, 501 (1908) (same); *Trade-Mark Cases (U.S. v. Steffens)*, 100 U.S. 82 (1879) (same)).

[7] In addition, facial invalidation is appropriate if an unconstitutionally vague statute would reach "'a substantial amount of constitutionally protected conduct.'" *Kolendar v. Lawson*, 461 U.S. 352, 358 n.8 (1983) (quoting *Hoffman Estates v. Flipside*, 455 U.S. 489, 494 (1982)). Facial invalidation of a vague statute is appropriate even "when [a statute] could conceivably have had some valid application." *Kolendar*, 461 U.S. at 358 n.8 (*citing Colautti v. Franklin*, 439 U.S. 379, 394-401 (1979)); *see also Morales*, 527 U.S. at 51, 64 (facially invalidating unconstitutionally vague statute).

It is equally clear from *Ayotte* that a plaintiff who has established the unconstitutionality of the challenged statute is entitled to some relief even if facial invalidation is deemed inappropriate. *See, e.g.*, *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." (citing *Marbury v. Madison*, 1 Cranch 137, 162-63 (1803))). Moreover, a plaintiff's entitlement to some relief from an unconstitutional statute does not depend on meeting either *Salerno*'s "no set of circumstances" test or *Casey*'s large fraction test.

The government ultimately concedes as much. Pet. Br. at 49-50 (*Carhart*) (if the "Court were to identify some aspect in which the Act is invalid, it may be possible to craft narrower injunctive relief"); *see also* Pet. Br. at 40 (*PPFA*) (same). It is a wise concession. After the *Ayotte* Court held that the Constitution required a medical emergency exception in the challenged parental notification law, it remanded for the determination of whether – consistent with legislative intent – a narrow injunction might be crafted. 126 S. Ct. at 969. The Court held that the plaintiffs were entitled to at least such relief, notwithstanding that the law was constitutional in all but "some very small percentage of" applications. *Id.* at 967.

In the face of the Act's constitutional infirmity, and the *Ayotte* Court's holding that a court must craft a remedy after finding a constitutional violation, the government nevertheless proposes – albeit cursorily – that if the Court "conclude[s] that the Act is unconstitutionally vague [or] . . . overbroad," it should simply "issue a narrowing construction

to avoid any constitutional infirmity." Pet. Br. at 39 (*PPFA*); *see also id.* at 36. But such a saving construction is by definition something a court adopts in order to avoid ever making the constitutional determination, and not something a court could adopt once it has made the determination that a law is infirm.[8] Moreover, the government has not proposed any construction that would save the Act,[9] let alone one to which the Act is "reasonably susceptible" or that is consistent with legislative intent. *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 385 (2005) ("The canon of constitutional avoidance comes into play only when . . . the statute is found to be

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[8] *See* Vermeule, *Saving Constructions*, 85 Geo. L.J. at 1949, 1959 ("modern avoidance . . . emphatically declines to decide a constitutional question"); *see also Clark*, 543 U.S. at 381 ("The canon [of constitutional avoidance] is not a method of adjudicating constitutional questions by other means."). As *Ayotte* demonstrates, the proper course once a court has found a violation is to fashion a remedy, which may be a limited injunction reaching only unconstitutional applications of the challenged law. Although the difference is subtle, a "narrowing" or "saving" construction is analytically distinct from a limited injunction. Both must be consistent with legislative intent, but they are otherwise subject to different standards: while a saving construction must be an interpretation to which the law is "reasonably susceptible," a limited injunction is appropriate if it satisfies the factors discussed in *Ayotte*. *See supra* at 10-12. Thus, if a court reaches the constitutional question, and finds a violation, it must then fashion a remedy, either partial or facial invalidation, and not – as the government suggests – adopt a saving construction. *See* Vermeule, 85 Geo. L. J. at 1950.

[9] The government's only concrete suggestion involves reading the statute to require a "specific intent to deliver the requisite portion of the fetus for the purpose of performing the ultimate lethal act *at the outset of the procedure*." Pet. Br. at 47 (*Carhart*); *see also* Pet. Br. at 32 (*PPFA*). For the reasons discussed in Respondents' briefs, this construction must be rejected. *See* Br. of Respondents at 42-45 (*Carhart*); Br. of Respondents (*PPFA*).

susceptible of more than one construction; and the canon functions as *a means of choosing between them.*"); *id.* at 382 (a limiting construction under the canon of constitutional avoidance is a "means of giving effect to congressional intent, not of subverting it"). Accordingly, and for the reasons set forth in Respondents' briefs, the Court should affirm the Ninth Circuit's holding that the Act is unconstitutional; then turn to the question of remedy; and affirm that the appropriate remedy in this case is facial invalidation.

III. The Government Incorrectly Claims That the Ninth Circuit Altered the Standard for "As-Applied" and "Facial" Challenges.

The government incorrectly claims that the Ninth Circuit "misstates both the facial-challenge standard and the substantive standard," with "[t]he practical effect . . . that . . . there is no meaningful distinction between as-applied and facial challenges."[10] Pet. Br. at 17 (*PPFA*). The government

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[10] The government's use of the terms "facial" and "as-applied" is confusing because these terms can be used in at least three ways. First, a statute has a "facial defect" if, by its very words, it is at odds with the Constitution. Thus, a statute requiring parental consent for minors' abortions that contains no judicial bypass mechanism has a "facial defect." *See, e.g., Planned Parenthood v. Danforth*, 428 U.S. 52, 72-75 (1976). By contrast, a statute may be unconstitutional "as applied" even if it contains no "facial defect" because the government's manner of enforcement violates the Constitution. A second sense of "facial" and "as-applied" relates to the remedy fashioned by the court: "facial invalidation" means that the government is barred from enforcing a statute in its entirely, while "as-applied invalidation" means that the government is barred from enforcing a statute only in certain applications. *See, e.g., Ayotte*, 126 S. Ct. at 968. A third meaning relates to whether the statute is unconstitutional "as-applied" to the particular plaintiffs bringing the challenge based on certain facts they allege. *See,*

completely misreads the decision of the Ninth Circuit, which in no way altered the standard for facial or as-applied challenges; indeed, the portion of the court's opinion the government cites is focused exclusively on the substantive constitutional standard.[11] *PPFA*, 435 F.3d at 1172

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e.g., *Edenfield v. Fane*, 507 U.S. 761, 780 (1993) (O'Connor, J., dissenting) (one sense of "as-applied challenge" is where the challenger points to some "special feature[]" of his case). The government confuses these meanings when, for example, it claims that the Ninth Circuit "injected an erroneous conception of facial challenges into its view of the relevant substantive test." Pet. Br. at 16 (*PPFA*). The government first seems to use the phrase "facial challenge" to discuss whether facial invalidation is appropriate, *id.* (referencing *Salerno*'s "no set of circumstances" test and *Casey*'s "large fraction" test), but then employs that phrase in the third sense, to discuss whether a particular plaintiff can bring a challenge based on certain facts that she alleges, *id.* at 17.

[11] The government seizes on the Ninth Circuit's use of the phrase "no circumstance exists" in its enunciation of the substantive standard for evaluating abortion restrictions that lack a health exception. Pet. Br. at 16-17 (*PPFA*) (citing *PPFA*, 435 F.3d at 1172 ("*Stenberg* holds that an abortion regulation that fails to contain a health exception is unconstitutional except when there is a medical consensus that no circumstance exists in which the procedure would be necessary to preserve a woman's health."). The government claims that by using this phrase, the Ninth Circuit "injected an erroneous conception of facial challenges into its view of the relevant substantive test." *Id.* at 16. In other words, the government implies that the Ninth Circuit turned *Salerno* on its head by suggesting that a plaintiff could obtain total invalidation of a statute simply by proving one unconstitutional application. But this is not what the court did: in the passage the government cites, the court analyzed whether the Act violated the Constitution under *Stenberg*, not whether the Act should be facially invalidated on the basis of that violation. *PPFA*, 435 F.3d at 1172 (citing *Stenberg*, 530 U.S. at 937); *see also, e.g.*, *Ayotte*, 126 S. Ct. at 967 (finding constitutional violation where "some very small percentage" of circumstances exists in which minors "need immediate abortions to avert . . . damage to their health"). Thus, unlike the government, *see supra* at 5-10, the Ninth Circuit analyzed the constitutional violation of the Act *separately* from the remedy. *See*

(enunciating standard for evaluating whether the Act's lack of a health exception rendered the Act constitutionally infirm).

The government suggests that based on the Ninth Circuit's ruling, a hypothetical plaintiff who does not claim her health is jeopardized by the Act could somehow obtain facial invalidation of the Act after demonstrating that it would endanger the health of *another* woman. Pet. Br. at 17 (*PPFA*). This is wrong: such a challenge would be dismissed for lack of Article III standing because the plaintiff could not prove that she suffered injury-in-fact. *See H.L. v. Matheson*, 450 U.S. 398, 405-07 (1981) (minor plaintiff, who did not allege that she was mature or emancipated, lacked Article III standing to challenge parental notification statute as to minors who were mature or emancipated) (cited by the government, Pet. Br. at 17 (*PPFA*), notwithstanding that *H.L.* demonstrates the fallacy of the government's hypothetical scenario). This hypothetical situation is irrelevant where, as here, Respondents have Article III standing[12] – because they suffer injury-in-fact – and may, consistent with prudential concerns, raise the constitutional rights of their patients harmed by the Act. *See Singleton v. Wulff*, 428 U.S. 106, 112-13 (1976) (physician plaintiffs suffer "concrete injury from operation of the challenged statute"); *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 440 n.30 (1983) (holding physician plaintiffs have standing and may raise rights of patients, and distinguishing physician's standing from minor plaintiff's lack of standing in *H.L.*), *rev'd in part*

PPFA, 435 F.3d at 1184-91 (after holding Act unconstitutional, the court fashioned a remedy).

[12] Neither the government nor any court has ever suggested otherwise.

on other grounds by Casey, 505 U.S. 833; *see also Casey*, 505 U.S. at 845 (implicitly recognizing Article III and third-party standing of clinics challenging abortion restrictions to raise the claims of their patients).

The government also claims that "this Court has repeatedly upheld applications of abortion regulations *to particular plaintiffs* while still recognizing the potential for other, unconstitutional applications." Pet. Br. at 17 (*PPFA*) (emphasis added); *see also* Pet. Br. at 19-20 (*Carhart*). While it is true as a general principle that a court can uphold applications of a statute to a particular plaintiff, that assertion is irrelevant where, as here, the plaintiffs have proved that the law would violate their rights and their patients' rights. Moreover, with the exception of *Connecticut v. Menillo*,[13] none of the cases the government cites in fact upholds a statute's application to certain plaintiffs. As noted above, the *H.L.* holding on which the government relies relates to standing. *See* Pet. Br. at 17 (*PPFA*) (citing *H.L.*, 450 U.S. at 405-07). In both *Ohio v. Akron Center for Reproductive Health* (*Akron II*), on which the government relies, *see* Pet. Br. at 20 (*Carhart*); Pet. Br. at 17 (*PPFA*), and *Rust v. Sullivan*, on which its *amici* rely, Br. of the States of Texas, et al. at 23 (*Carhart*); Br. of the Christian Medical and Dental Associations, et al. at 12 (*PPFA*), the Court engaged in constitutional avoidance: it ruled against the plaintiffs by construing the challenged laws so as to avoid constitutional

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[13] *Connecticut v. Menillo*, 423 U.S. 9 (1975), is entirely consistent with the Court's decision in *Ayotte*. The Court in *Menillo* held that Connecticut's pre-*Roe v. Wade* criminal abortion statute could be applied to a non-physician who performed an abortion. *Id.* at 11. Limiting the statute's application to non-physicians involved line drawing that was not "inherently complex." *Ayotte*, 126 S. Ct. at 968.

difficulties,[14] with no indication that the outcome would have been different had the same case, before the statute was enforced, been brought by different plaintiffs.[15] *See, e.g.*, Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. at 273 (*Akron II* holding and Justice O'Connor's concurrence in *Webster* rested on constitutional avoidance). Similarly, in *Simopoulos v. Virginia*, 462 U.S. 506, 510 (1983), also cited by the government, Pet. Br. at 17 (*PPFA*); Pet Br. at 20 (*Carhart*), the failure of the constitutional claims was wholly unrelated to the standard for facial challenges: it related instead to defective pleading. In that case, the criminal defendant failed to articulate an adequate basis for his challenge to the abortion statute under which he was charged, and the Court also rejected the claim

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[14] *Akron II*, 497 U.S. 502, 513-14 (1990) (rejecting claim that judicial bypass in parental consent law was constitutionally inadequate because plaintiffs' statutory interpretation – that bypass could take twenty-two days – was unsupported and ignored provision permitting minor to request expedited proceedings); *Rust*, 500 U.S. at 195 (rejecting plaintiffs' challenge because the Court construed the regulation to avoid constitutional problem that would arise from prohibiting referrals for life-saving abortions in federally funded clinics); *see also Webster v. Reprod. Health Servs.*, 492 U.S. 490, 523-24 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (rejecting plaintiffs' interpretation that "the State *could try* to enforce the ban" on using a "*public facility*" for abortions "against *private* hospitals using public water and sewage lines, . . . equipment or . . . land," where "straightforward" applications of the ban were constitutional (emphases added)).

[15] Though the Court in *Akron II* did not "uph[o]ld applications" of the statute at issue "to particular plaintiffs," as the government claims, Pet. Br. at 17 (*PPFA*), it left open the possibility of a challenge based on unconstitutional enforcement of the statute. 497 U.S. at 514. While unconstitutional enforcement of a statute is encompassed in one meaning of the phrase "as-applied challenge," *see supra* at 14 n.10, that is not the meaning that the government employs in its discussion of *Akron II*. *See* Pet. Br. at 17 (*PPFA*).

that his indictment was constitutionally deficient. *Id.* at 509, 517-18. Thus, there is no support for the government's claim that the Ninth Circuit altered the standard for facial challenges, or that this Court's prior abortion jurisprudence has "routinely" upheld abortion regulations as applied to particular plaintiffs.

CONCLUSION

For the reasons set forth above, and in the Briefs for the Respondents, the Court should affirm the judgments of the courts of appeals.

Respectfully submitted,

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